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No. 80-274

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SANTA CLARA,
Respondent,

ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE
Real Parties in Interest.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

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Pursuant to Rule 46, paragraph one of the Rules of this Court, motion is hereby made that the real parties in interest be allowed to proceed in forma pauperis before this Court, for the reasons stated in the attached affidavit. Leave of the Court is requested to file the attached typewritten Opposition to Petition for Writ of Certiorari pursuant to Rule 39.

SHELDON PORTMAN, Public Defender
County of Santa Clara

Attorney for Real Parties in
Interest Engert and Gamble

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AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, Allen Leroy Engert, under penalty of perjury, depose and say:

(1) I am a real party in interest in the above-entitled case;

(2) Because of my poverty I am unable to pay the costs of said cause, or the cost of printing the attached Opposition to Petition for Writ of Certiorari;

(3) I am unable to give security for any costs;

(4) I have been incarcerated continuously since May, 1979.

Executed this 3 day of October, 1980, at San Jose, California.

Allen L. Engert
ALLEN LEROY ENGERT

Sworn to and subscribed before
me this 3 day of October, 1980.

Rosemary Seiter Morrison
ROSEMARY SEITER MORRISON
Deputy Public Defender
(See Cal. Gov. Code §24057)

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I, John Wayne Gamble, under penalty of perjury, depose and say:

(1) I am a real party in interest in the above-entitled case;

(2) Because of my poverty I am unable to pay the costs of said cause, or the cost of printing the attached Opposition to Petition for Writ of Certiorari;

(3) I am unable to give security for any costs;

(4) I have been incarcerated continuously since August, 1979.

Executed this 3 day of October, 1980, at San Jose, California.

John Gamble
JOHN WAYNE GAMBLE

Sworn to and subscribed before
me this 3 day of October, 1980.

Rosemary Sfiter Morrison
ROSEMARY SFITER MORRISON
Deputy Public Defender
(See Cal. Gov. Code §24057)

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Real Parties in Interest.

PROOF OF SERVICE

Affidavit of Sheldon Portman,
Member, Supreme Court Bar

I, Sheldon Portman, depose and say under penalty of perjury:

On October 3, 1980, true copies of the Motion for Leave to Proceed in Forma Pauperis, and Affidavits of John Wayne Gamble and Allen Leroy Engert in support of Motion for Leave to Proceed in Forma Pauperis, addressed to the Attorney General of the State of California, attention John Moy (counsel for petitioner) and to the Superior Court of Santa Clara County, attention Hon. Homer B. Thompson (respondent), have been deposited in a United States Post Office mail box at San Jose, California, as required by Rule 28, California Rules of Court.

Executed this 3rd day of October, 1980, at San Jose, California.

Sheldon Portman

SHELDON PORTMAN
Public Defender
Santa Clara County, California

Sworn to and subscribed
before me this 3rd day
of October, 1980.

Norwood A. Nedom

NORWOOD A. NEDOM
Deputy Public Defender
(See Cal. Gov. Code §24057.)

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to the Court of Appeal of the
State of California,
First Appellate District, Division Four

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QUESTIONS PRESENTED

I.

Whether the decision below was based on an independent and adequate nonfederal ground.

II.

Whether the death penalty special circumstance of California Penal Code Section 190.2, subdivision (a)(14) - "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity" is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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JURISDICTION

Real parties in interest submit that jurisdiction to review the instant decision does not exist under 28 U.S.C. section 1257(3) since the trial court's decision declaring California Penal Code §190.2(a)(14) to be void for vagueness was explicitly based on the due process clause of both the State and Federal Constitutions. (California Constitution, Article I, Section 7. See certified copy of the respondent trial court's order, attached as Appendix A.) That order was affirmed by the California Court of Appeal. There being an adequate and independent nonfederal ground for the instant decision, jurisdiction is lacking, and certiorari must be denied. (Wolfe v. North Carolina, 364 U.S. 177, 179, n.3.)

ARGUMENT:

I. THE COURT LACKS JURISDICTION UNDER U.S.C. §1257(3) BECAUSE THE DECISION VOIDING THE SPECIAL CIRCUMSTANCE IN QUESTION WAS PREMISED ON THE STATE CONSTITUTIONS DUE PROCESS CLAUSE, PROVIDING AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DECISION.

The order of the trial court declaring the special circumstance void for vagueness explicitly relied on the due process guarantees of both the state and federal constitution. (See the certified copies of the orders, attached as Appendices A and B. A request for formal transmission by the clerk of the respondent court has been made.)

Petitioner has argued to this court that Article I, §27 of the California Constitution makes the reach of the state constitution coterminous with that of the federal constitution in regard to any death penalty statute, arguing at least impliedly that there is no independent state ground for the instant decision. Petitioner cites People v. Frierson (1979) 25 Cal.3d 142, 185 for that proposition. The argument fails for several reasons: (1) The Frierson opinion cited commanded only a plurality of the California Supreme Court, (2) Frierson did not decide the issue as to the possibility of independent state constitutional grounds with respect to matters other than the constitutionality of the punishment of death, and (3) Article I, §27, cited by the petitioner is limited by its terms to prevent "punishment for such offenses" from being deemed "to contravene any other provision of this constitution." The decision of the California Court of Appeal plainly did not deem the punishment of death to be unconstitutional under the due process clause, but merely struck one of nineteen "special circumstances"[1/] as being too vague to provide an ascertainable standard of guilt, especially

1/ See Cal. Penal Code §190.2(a)(1) through (19). The limited nature of the instant decision is further highlighted by the fact that one of the 14 special circumstances, concerning murder during the commission of specified felonies, contains nine further subsections upon which capital murder might be predicated (Cal. Penal Code §190.2(a)(17).

when read in conjunction with another similar special circumstance (Cal. Penal Code §190.2(a)(18)), which also provides capital liability for intention of murder that "involved the infliction of torture."

Petitioner is thus asking this court to construe the California Constitution in a way that would preclude the independent application of the state constitution's due process clause to the procedure by which the death penalty is administered, as opposed to the constitutionality of the punishment of death itself. The language of the constitutional provision cited by the petitioner (Article I, §27) does not support petitioner's argument, nor does the cited Frierson opinion (which in any event did not command a majority of the California Supreme Court.) The proposition that the United States Supreme Court does not (and cannot) authoritatively construe the constitutions of the various states is axiomatic. The existence of the independent and adequate state constitutional ground for the instant decision requires denial of certiorari. Wolfe v. North Carolina, supra.

II. THE "SPECIALLY HEINOUS, ATROCIOUS AND CRUEL" SPECIAL CIRCUMSTANCE, IN THE CONTEXT OF THE CALIFORNIA STATUTORY SCHEME, IS UNCONSTITUTIONALLY VAGUE UNDER THE FEDERAL DUE PROCESS CLAUSE.

A. There is No Conflict Between the Instant Decision and Proffitt.

Petitioner repeats his argument, rejected by the courts below, that Proffitt v. Florida (1976) 428 U.S. 242 decided that the language in question here was not void for vagueness under the Fourteenth Amendment's due process clause. Even a cursory examination of the Proffitt decision reveals the lack of merit of the argument. (See Proffitt, Id., at p. 254, fn. 11; Gregg v. Georgia (1976) 428 U.S. 153, 201 fn. 51.) Due to the limited

grant of certiorari in Gregg and Proffitt, the void for vagueness grounds of the instant case were expressly not reached. Petitioner thus has attempted to manufacture a conflict between the instant case and Proffitt, persistently and willfully ignoring the language of Proffitt itself as to what issue it was deciding. The California Court of Appeal quoted the relevant portions of Proffitt and Gregg and correctly held that "the broader question of whether the statutory language is too vague to comport with due process was expressly left open." (People v. Superior Court (Engert) (1980) 105 Cal.App.3d 364, 369-370.)

B. The "Specially Heinous, Atrocious and Cruel" Special Circumstance Presents Crippling Vagueness Problems in the California Death Penalty Scheme Since Another Special Circumstance Covers the Inflictions of Torture.

Even if the issue of the due process vagueness of the "heinous, atrocious and cruel" special circumstance (hereinafter referred to as HAC) had actually been decided by this Court in the context of the Florida death penalty statute, the different context of the California statutory scheme would require a contrary conclusion. The most unanswerable argument (and one never refuted or even mentioned by petitioner) as to the vagueness of the HAC special circumstance was clearly set forth by the California Court of Appeal in its opinion below: The California death penalty scheme already contains a special circumstance which provides for possible capital liability when "[t]he murder was intentional and involved the infliction of torture." (Cal. Penal Code §190.2, Subd. (a) (18). The task of limiting or construing the HAC special circumstance to give it an ascertainable meaning that would differentiate it from the"infliction of torture" special circumstance was deemed impossible by the Court of Appeal, and it is a problem

that has never been addressed by the petitioner, either in the litigation below or in the petition to this court. The Florida court's decision to limit the reach of the HAC language to the "unnecessarily torturous" made some sense in the context of a statutory scheme that did not otherwise cover the infliction of torture as an aggravating circumstance. (See Fla. Stat. Ann. §921.141(5) (Supp. 1976-77), as listed in Proffitt, supra, 428 U.S. at 248, n. 6.) To place the HAC language, with its "thesaurus of pejorative adjectives" (Engert, supra, 105 Cal.App.3d at 368) into a list of special circumstances which already contains the concededly definite language regarding the "infliction of torture" just as plainly makes no sense. It is confusing, duplicative and vague. The petitioner cannot claim that voiding the HAC special circumstance leaves torturous conduct outside the purview of capital murder while the "infliction of torture" special circumstance is on the books. No area of potentially capital murder has been removed from the purview of the statutory scheme by the decision of the court below. Instead, the California Court of Appeal recognized that if a jury is instructed that torture means the same thing for both special circumstances (and no other reasonable interpretation is apparent or has been offered by petitioner), then insuperable problems of differentiation, construction and application would arise. (Engert, 105 Cal.App.3d at 368-369.)

> If the jury is instructed that torture means the same thing for both special circumstances, the jury must look to a "thesaurus" of pejorative adjectives" (Pryor, supra, 25 Cal.3d at p. 248, [Pryor v. Municipal Court (1979) 25 Cal.3d 238, 249]) to distinguish between the two special circumstances. No commonly understood meaning attaches to the term "unnecessarily torturous" as distinguished from "the infliction of torture." If the jury is unable to find "torture" within the meaning of subdivision (a)(18), then subdivision (a)(14) is an invitation to the jury to register a general feeling of revulsion toward a particular homicide defendant by finding the truth of that special circumstance.

In sum, the petitioner has (at least in his briefs below) conceded a modicum of vagueness in the HAC language, but has insisted that by importing the limiting language imposed by the Florida Supreme Court in State v. Dixon (1973) 283 So.2d 1, 9, the language is sufficiently definite. Petitioner has ignored the fact that a specific torture special circumstance is present in the California death penalty scheme and has persistently refused to offer any rational differentiation between the two. The Court of Appeal has wisely voided the HAC, recognizing that if torture is not found under the "infliction of torture" special circumstance, that the laundry list of pejorative adjectives (heinous, atrocious, cruel, conscienceless, pitiless, manifesting exceptional depravity) would be an invitation to unbridled jury discretion. The petitioner never relates his insistence that the "HAC" is definite because it is limited to torture to the reality that the statute covers torture, in a simple, comprehensible section, without using the thesaurus of highly subjective terms used in HAC. When the language of HAC is placed in a statute that contains a special circumstance relating to infliction of torture, extreme problems of differentiation and harmonization arise. If the two sections cannot and are not differentiated in manner which is comprehensible to a jury, then the dangers of having a special circumstance finding on HAC that is not premised on the purported "unnecessarily torturous" limitation is increased, allowing a clear avenue for inconsistent and capricious application of the language.

If the jury is instructed that torture means the same thing for both special circumstances, then the jury must return to the pejorative adjectives in an attempt to give the clause some meaning vis a vis §190.2(a)(18). The only conceivable purpose in submitting the special circumstance would then be to invite

the jury to ignore the limiting instruction and return to the epithets. It is this danger that the Court of Appeal recognized in viewing HAC in the context of the rest of the California death penalty statute, and which justified and required the voiding of the HAC special circumstance.

C. The "Especially Heinous, Atrocious, and Cruel" Special Circumstance Does Not Provide an Ascertainable Standard of Guilt in its California Context as an Element of Capital Murder Upon Which the Jury Must Make a Factual Finding Beyond a Reasonable Doubt.

There is yet another vital contextual difference between the use of the HAC language in the California statute and the Florida statute. In the California statute, the HAC language is presented to the jury in the guilt phase of the trial and the jury is required to make a factual finding utilizing the beyond a reasonable doubt standard. Only after a jury's affirmative factual finding can a trial move into the penalty phase, with the possibility only of death or life imprisonment without parole. (Cal. Pen. Code §190.2 et. seq.) This is to be contrasted to the Florida scheme, in which a first degree murder must be proved. Then a penalty phase follows, at which a jury recommends either life imprisonment (with the possibility of parole) or death. The jury's verdict is advisory only, the actual sentence is determined by the trial judge who is free to reject the jury's advisory penalty verdict. (See Proffitt, supra, 428 U.S. at pp. 248-249.)

The issue then arises as to whether language that is suitable in guiding sentencing discretion is, ipso facto, sufficient to establish an ascertainable standard of guilt on a factual element that must be proved in California before a penalty phase is held. Petitioner again seeks to ignore the vastly different context in which the HAC language is used in California as compared to Florida.

Petitioner attempts this by posing the issue as to whether a "procedure which requires a jury to find a special circumstance beyond a reasonable doubt and by unanimous verdict before a death penalty determination hearing may be held[,] provides no less protection to an accused" than the Florida scheme. (Pet. for Cert. at 15.) While the relative merits of the California procedure of separating capital murders from non-capital is an interesting issue, it is not presented for review by the instant case. The fact is that California has chosen to define factual elements, proof of which leads into the penalty determination phase. Having chosen to require proof of certain facts in the guilt phase, there can be no doubt of the duty of the state under the due process clause to provide a statute sufficiently definite to provide an ascertainable standard of guilt.

The due process ban on vagueness in criminal statutes has two components, that of adequate notice to potential offenders and adequate guidance to those who will apply the statute.

> A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. (People v. McCaughran (1957) 49 Cal.2d 409, 414, per Traynor, J.)

See also Giaccio v. Pennsylvania (1966) 382 U.S. 399, 402, 403, 404:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without legally fixed standards what is prohibited and what is not in each particular case.... Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens

> upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce....
>
> It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct" or "reprehensible conduct." If used in a statute which imposed forfeitures, punishments, or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause.

It is thus beyond question that the due process clause "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement'." Smith v. Goguen (1974) U.S. 566, 572-573.

Petitioner essentially contends that the HAC language can be moved from the position of an aggravating circumstance to be considered at sentencing of a person convicted of a capital offense (as in the Florida death penalty statute reviewed in Proffitt) into the offense-defining, guilt-determining part of a criminal trial, with no vagueness problems arising. The argument appears to be the simple one: if you can use this "especially heinous, atrocious, or cruel..." language as a factor to guide sentencing discretion, then you can use it to define an element of a capital offense. Such an argument is simple but it ignores the vast difference between the due process requirement of clarity in offense-defining statutes, for purposes of providing both notice and an ascertainable standard of guilt, versus the open inquiry, now constitutionally mandated in capital cases by Lockett v. Ohio (1978) 438 U.S. 580, that occurs at the time of a capital sentencing. Petitioner's argument obliterates the difference between the long-standing

principal of definiteness in the definition of crime and the historical and now constitutionally required breadth of factors which come into play at sentencing. Petitioner seeks to accomplish this obliteration by citing the United States Supreme Court's limited Eighth Amendment approval in Proffitt, supra,[2/] of the "especially heinous, atrocious, and cruel..." language as an aggravating factor to be considered at sentencing and then leaping to the conclusion that the justification for upholding the Florida aggravating circumstance applies with equal force to the California statute.

Such an argument is analogous to contending that every aggravating circumstance for felony sentencing listed in California Rule of Court 421 could be made into a sufficiently definite criminal statute.

By this reasoning, the Attorney General might, at the next legislative session, ask for a new penal statute proscribing the possession of a "large quantity of contraband," in the language of Rule 421(a)(11). The notice and ascertainable standard of guilt violation created by the conversion of this valid sentencing factor into an offense-defining statute could not be justified by the argument that since the language is sufficient as a

[2/] In light of petitioner's continued misreading of Proffitt, the plurality opinion of Justice Stewart bears repeating: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-256 (emphasis added). The concurring opinion of Justices White, Burger and Rehnquist was similarly circumscribed: "although the statutory aggravation and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered." 428 U.S. at 260 (emphasis added). The plurality noted that due to the limited grant of certiorari the vagueness and overbreadth attack was considered only in the Eighth Amendment "arbitrary or capricious" sense (428 U.S. at 254, n. 11). Thus the U.S. Supreme Court did not consider, or rule upon, the due process void-for-vagueness issue raised by the use of the "especially heinous" language as an offense-defining statute.

sentencing factor, it is sufficiently definite as an offense-defining statute. And yet that is the premise of petitioner's misplaced reliance on Proffitt v. Florida.

The very distinction missed by petitioner was made recently by Presiding Justice Kaus of the Second District Court of Appeals in People v. Thomas (1979) 87 Cal.3d 1014, 1023:

> Nor are we persuaded that the "circumstances in aggravation" enumerated in Rule 421 must fall because they have not been drafted with the narrowness and precision we require in statutes defining criminal offenses.

In contrast to the insistent demand of the Due Process Clause for narrowness and clarity in statutes which proscribe conduct and establish a standard of guilt is the preception that Due Process should not inhibit, and in capital cases requires, the broadest type of inquiry during the discretionary penalty determination. This concept of latitude in sentencing as distinguished from the guilt-determination, was detailed in Williams v. New York (1949) 337 U.S. 241, 246-247:

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused.... A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.

More recently, the U.S. Supreme Court in Lockett v. Ohio, supra, 438 U.S. at 602, recognized the continuing vitality and validity of Williams v. New York:

> We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. See Williams v. New York, 337 U.S. at 247-248, 93 L.Ed. 1337, 69 S.Ct. 1079; Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. at 55, 82 L.Ed. 43, 58 S.Ct. 59. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account.

Due to the wide range of factors taken into account at time of

sentencing, relating both to the offender and the offense, precise definition of each factor is less necessary than when the law is framing a standard of guilt. As Lockett held, too much precision in defining mitigating factors is itself a Due Process violation in capital cases, in that it "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, supra, 438 U.S. at 605.

It is an undeniable fact that the California death penalty scheme takes the HAC language from its sentence discretion-guiding function (as used in Florida) and attempts to use it as a factual element of a charge of capital murder, requiring the fact-finder to find its truth or falsity. Thus, Proffitt, not on point on the due process vagueness issue (for the reasons outlined in Section A, supra), is not even helpful to petitioner by way of analogy, given the recognized distinction that what is tolerable (or even desirable) vagueness in a sentence guiding factor may well violate the due process clause if used in a statute defining factual elements of a criminal offense.

CONCLUSION:

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DATED: Oct. 3, 1983

SHELDON PORTMAN
Public Defender
Santa Clara County

MICHAEL A. KRESSER
Deputy Public Defender

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Real Parties in Interest.

PROOF OF SERVICE

Affidavit of Sheldon Portman,
Member, Supreme Court Bar

I, Sheldon Portman, depose and say under penalty of perjury:

That on October 3, 1980, true copies of the Opposition to Petition for Writ of Certiorari, addressed to the Attorney General of the State of California (counsel for petitioner) and to the Superior Court of Santa Clara County (respondent), have been deposited in a United States Post Office mail box in San Jose, California, as required by Rule 28.

Executed this 3rd day of October, 1980, at San Jose, California.

SHELDON PORTMAN
Public Defender
Santa Clara County, California

Sworn to and subscribed before
me this 3rd day of October, 1980.

NORWOOD A. NEDOM
Deputy Public Defender
(See Cal. Gov. Code §24057.)

APPENDICES

FILED

APPENDIX A

FILED
Filed NOV 29 1979
JOHN KAZUSOWSKI, Clerk
By [signature] Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JOHN WAYNE GAMBLE, Defendant.	No. 73240 ORDER GRANTING MOTION FOR RECONSIDERATION AND, UPON RECONSIDERATION, SUSTAINING AND GRANTING DEMURRER/MOTION TO STRIKE

The motion by plaintiff for reconsideration of the Court's Order Sustaining and Granting Demurrer/Motion to Strike dated November 15, 1979, was, at the hearing of said motion for reconsideration, on November 26, 1979, granted by the Court.

Upon full reconsideration, it is now the order of the Court that the Demurrer/Motion to Strike by the defendant, John Wayne Gamble, seeking an order to strike the special circumstance alleged in Count One of the Information on file herein, which special circumstance alleges "that the foregoing murder was especially heinous, atrocious, and cruel, manifesting exceptional depravity as described in Penal Code Section 190.2(a)(14)," be

hereby sustained and granted.

The provisions of Penal Code Section 190.2(a)(14) do not provide an ascertainable standard of conduct or workable standard of guilt. Penal Code Section 190.2(a)(14) is unconstitutionally void for vagueness under due process requirements of both State and Federal constitutions.

DATED: This 29th day of November, 1979.

Judge of the Superior Court

The foregoing instrument is a correct copy of the original on file in this office.
ATTEST OCT - 3 1980
JOHN KAZUBOWSKI
County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Santa Clara.
BY _____ DEPUTY
E. RODRIGUEZ

SUPERIOR COURT SANTA CLARA CO. CALIF.

5441A

APPENDIX B

FILED

Filed NOV 30 1972
JOHN KAZUBOWSKI, Clerk
By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ALLEN LEROY ENGERT, Defendant.	No. 72637 ORDER SUSTAINING AND GRANTING DEMURRER/MOTION TO STRIKE SPECIAL CIRCUMSTANCES UNDER PENAL CODE § 190.2(a)(14), AND DENYING MOTION TO DISMISS SPECIAL CIRCUMSTANCES UNDER PENAL CODE § 190.2(a)(18)

The demurrer/motion to strike by defendant, Allen Leroy Engert, the special circumstances alleged in Count One which allege that "said murder was exceptionally heinous, atrocious and cruel manifesting exceptional depravity," under Penal Code Section 190.2 (a)(14), is hereby sustained and granted.

The provisions of Penal Code Section 190.2(a)(14) do not provide an ascertainable standard of conduct or workable standard of guilt. Penal Code Section 190.2(a)(14) is unconstitutionally void for vagueness under due process requirements of both State and Federal constitutions.

In view of the foregoing ruling with respect to Penal Code Section 190.2(a)(14), it is not necessary to pass upon other issues raised regarding that section, including the motion to dismiss pursuant to Penal Code Section 995.

The motion by said defendant to dismiss the special circumstances alleged in Count One which state that "said murder was intentional and involved the infliction of torture," under Penal Code Section 190.2(a)(18), said motion being made pursuant to Penal Code Section 995, is hereby denied.

DATED: This 31st day of November, 1979.

Judge of the Superior Court

The foregoing instrument is a correct copy of the original on file in this office.
ATTEST OCT - 3 1980
JOHN J. ZUBOWSKI
County Clerk and ex-officio Clerk of the Superior Court of the State of California in and for the County of Santa Clara.
BY C. [illegible] DEPUTY
E. RODRIGUEZ

SUPERIOR COURT SANTA CLARA CO. CALIF.

5441A